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No. 15-1191

IN THE

Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,

Petitioner,

v.

LUIS RAMON MORALES-SANTANA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether sections 301 and 309 of the Immigration and Nationality Act of 1952 violate the Fifth Amendment's guarantee of equal protection by requiring unwed citizen fathers to satisfy substantially more burdensome physical presence requirements than unwed citizen mothers in order to transmit derivative citizenship to their foreign-born children.

2. Whether the court of appeals properly remedied the equal protection violation by extending to unwed citizen fathers of foreign-born children the same rights available to similarly situated unwed citizen mothers.

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INTRODUCTION

The government does not dispute that sections 301 and 309 of the Immigration and Nationality Act of 1952 discriminate on the basis of gender by making it more difficult for unwed citizen fathers than unwed citizen mothers to confer derivative citizenship on their children born abroad. While the government seeks review in an effort to justify that discrimination, the court of appeals correctly held below that no such justification is possible. As the court explained in its exhaustive and unanimous decision (Pet. App. 3a-41a & Opp. App. 1a), the statutory scheme fails the applicable level of intermediate scrutiny because it does not advance any actual and substantial government purpose. The decision below, because plainly correct, does not warrant this Court's plenary review.

This Court's prior affirmance, by equally divided vote, of a contrary court of appeals ruling in *Flores-Villar v. United States*, 564 U.S. 210 (2011), does not support a grant of the current petition. The court of appeals' decision in that case lacked the benefit of subsequent historical analysis and scholarship demonstrating that Congress's *actual* purpose in enacting the discriminatory scheme was to provide more favorable treatment to unwed citizen mothers based on archaic and overbroad stereotypes about the roles of mothers and fathers in the lives of non-marital children. Far from seeking to ensure a U.S. connection or prevent statelessness, as the government asserts, Congress simply assumed that unwed mothers, not unwed fathers, would be the primary caretakers of foreign-born non-marital children and thus sought to protect such mothers from possible separation from

their children through preferential derivative-citizenship provisions. In light of this compelling historical evidence, which renders obsolete the conclusions reached without analysis by the court of appeals in *Flores-Villar*, the current split of authority is likely to resolve itself without this Court's intervention.

The government also seeks review of the remedy ordered by the court of appeals, but there is no split among the lower courts on that issue. All courts that have considered the issue have held that the appropriate remedy is to extend to unwed fathers the statutes' more favorable treatment of unwed mothers. Nor, contrary to the government's assertion, did the court exceed its authority in so ordering. Thus, review is not warranted on the second question presented.

Finally, even if the Court were inclined to consider the constitutionality of the relevant statutory provisions for a second time, this case is a poor vehicle for doing so. Because of the unique circumstances of Respondent Luis Ramon Morales-Santana's and his father's history, there are multiple alternative, substantial statutory grounds for affirming the decision below While the court of appeals rejected those grounds (Pet. App. 10a-13a), Respondent may raise them and this Court would have to reach them before affirming or reversing the judgment below. The existence of those alternative grounds for affirmance weighs strongly against granting the petition.

For these reasons, the petition should be denied. In the alternative, because the decision below is clearly correct, the Court should grant the petition and summarily affirm.

COUNTERSTATEMENT

1. The court of appeals rendered its unanimous decision after an extraordinarily prolonged and exhaustive briefing process. After reviewing the parties' full briefing and hearing oral argument, the court of appeals ordered two rounds of supplemental briefing.[1] The court of appeals then remanded the case to the U.S. District Court for the Western District of New York for further fact-finding.[2] The court of appeals then ordered further supplemental briefing as to whether the legislative history showed that the drafters intended to treat unwed citizen mothers more favorably than unwed citizen fathers based on gender stereotypes about parental roles.[3] The government

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[1] See C.A. Dkt. 122 (Apr. 11, 2013) (directing the filing of supplemental letter briefs on (1) the legislative history of the 1940 Act and 1952 Act, and (2) whether the case should be remanded to the BIA to determine if Morales-Santana's father satisfied the one-year continuous residency requirement of Section 309(c)); C.A. Dkt. 135 (June 27, 2013) (directing the government to file a supplemental letter addressing whether the government concedes that Morales-Santana's father was a U.S. national at the time of his birth and had been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to Morales-Santana's birth).

[2] C.A. Dkt. 140-1 (July 16, 2013) (remanding the case to the district court to determine whether Morales-Santana's father would satisfy the one-year continuous presence requirement of Section 309(c) if it applied to him).

[3] C.A. Dkt. 163 (Oct. 8, 2014) (directing the filing of supplemental letter briefs on (1) whether Congress had, as an actual legislative purpose for enacting Sections 301 and 309 of the 1952 Act, the goal of providing against the separation of mothers from their children, and (2) if so, whether the provisions survive scrutiny under the equal protection guarantee of the Fifth Amendment).

thus had ample opportunity below to provide evidence supporting the arguments now made in the petition.

2. From 1790 to 1934, consistent with common law notions of coverture, citizenship legislation concerning children born abroad focused only on fathers with no mention of mothers. Such legislation granted U.S. citizenship to foreign-born children as long as the father had resided in the United States prior to the birth of the child. See *Rogers v. Bellei*, 401 U.S. 815, 823-26 (1971). Despite the paternal focus of those early citizenship statutes, the State Department in practice granted citizenship to foreign-born children of *unmarried* U.S.-citizen mothers. See *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearing on H.R. 6127 Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 43 (1945) (the "1940 Act Hearings").

In 1934, Congress altered the citizenship laws to allow derivative citizenship to be conferred on a non-marital child born abroad as long as the child's U.S.-citizen parent—mother *or* father—resided in the United States for any period of time before the child's birth. See Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797

3. The Nationality Act of 1940, ch. 876, 54 Stat. 1137 (the "1940 Act") made significant changes to the pre-1940 regime by permitting unwed fathers to confer derivative citizenship only if they satisfied a ten-year, age-calibrated U.S. physical-presence requirement before the child's birth. 1940 Act § 201(g). By contrast, the 1940 Act permitted unwed mothers to confer derivative citizenship as long as they had resided in the United States for any period of time prior to the child's birth. *Id* § 205.

The Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (the "1952 Act") preserved the basic structure of the 1940 Act. Like the 1940 Act, the 1952 Act imposed far less onerous derivative-citizenship restrictions on unwed mothers than on unwed fathers. Under Section 309(c) of the 1952 Act, a child born abroad to an unwed citizen mother obtained U.S. citizenship at birth if the mother was ever physically present in the United States for a continuous period of one year, at any time and at any age (even at her birth) before her child was born.

By contrast, Section 301(a)(7) of the 1952 Act—the statute in effect when Respondent was born—provides that a child born abroad to an unwed citizen father may obtain U.S. citizenship at birth only if the father: (1) was physically present in the United States (or one of its outlying possessions) for a period of ten years, five of which were after he turned fourteen; and (2) subsequently legitimated the child. Under this framework, an unmarried citizen father under the age of nineteen could never confer citizenship on his foreign-born child.

4. Respondent's father was born in the U.S. outlying possession of Puerto Rico on March 19, 1900, and acquired U.S. citizenship pursuant to the Jones Act. See Jones Act of Puerto Rico, ch. 145, 39 Stat. 951 (codified at 8 U.S.C. § 1402 (1917)). He was physically present in Puerto Rico until February 27, 1919, just 20 days shy of his nineteenth birthday, when he left for the then U.S.-occupied Dominican Republic to work for a U.S. company. Pet. App. 6a.

Respondent was born in the Dominican Republic on June 15, 1962. His father was by then a U.S. citizen but his mother was Dominican. His parents married in 1970 when he was eight years old, thereby

legitimating him, and they moved to the United States when Respondent was thirteen. Now 53 years old, Respondent has lived in the United States as a lawful permanent resident for more than 40 years.

5. On March 15, 2000, the INS charged Respondent with removability and he was ordered removed to the Dominican Republic. Pet. App. 45a-49a. On appeal, the Board of Immigration Appeals rejected Respondent's argument that he obtained derivative citizenship through his father. Because his father left Puerto Rico 20 days before his nineteenth birthday, he fell a mere 20 days short of satisfying Section 301(a)(7)'s physical presence requirements and therefore was not permitted to transmit derivative citizenship to Respondent. Pet. App. 42a-44a.

Respondent filed a petition for review to the U.S. Court of Appeals for the Second Circuit. In its decision dated July 8, 2015 and amended October 30, 2015 (Pet. App. 3a-41a & Opp. App. 1a), the court held that the discriminatory scheme is unconstitutional under the Fifth Amendment and that that the proper remedy is a determination that Respondent obtained U.S. citizenship at birth.

The court of appeals first held that Sections 301(a)(7) and 309(a), (c) of the 1952 Act discriminate based on the gender of the citizen parent, in violation of the Fifth Amendment's guarantee of equal protection. After determining (Pet. App. 16a-20a) that intermediate scrutiny supplies the proper standard of review, the court applied that standard and found that the government's proffered rationales could not sustain the challenged gender discrimination. Based on meticulous analysis of the statutory text and legislative history, the court concluded that: (1) while there is a important interest in ensuring that foreign-

born children have a connection to the United States, the differential treatment of unwed mothers and unwed fathers is not substantially related to that interest (Pet. App. 21a-25a); and (2) while reducing the risk of statelessness for foreign-born children is also an important governmental interest, there is no evidence that Congress was motivated by that concern in enacting its gender-based physical presence requirements (Pet. App. 25a-32a), an analysis the court found confirmed (Pet. App. 32a-34a) by the contemporaneous availability of effective gender-neutral alternatives. To the contrary, the court of appeals concluded (Pet. App. 31a & n.13), Congress's actual purpose in adopting a gender-discriminatory physical presence requirement appears to have been to act upon gender stereotypes about the different roles, abilities, and social expectations of mothers and fathers in relation to their non-marital children.

Turning to the question of how to remedy the equal protection violation (Pet. App. 35a-41a), the court of appeals held that unmarried citizen fathers were entitled to the same statutory rights available to similarly situated unmarried citizen mothers. Because there is no dispute that Respondent's father satisfied the requirements applicable to unwed citizen mothers, the court of appeals held that "Morales-Santana is a citizen as of his birth." Pet. App. 41a.

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT WARRANT PLENARY REVIEW

A. Any Circuit Split On The First Question Presented May Be Resolved Without This Court's Intervention

Contrary to the government's suggestion (Pet. 30), this Court's review is not necessary to resolve a split of authority on the underlying equal protection question. As the decision below acknowledges (Pet. App. 22a & 34a n.17), it departs from that of the Ninth Circuit in *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *aff'd by an equally divided court*, 564 U.S. 210 (2011). But the difference between the two decisions is explained by a significant disparity in the extent and quality of information considered by the two courts concerning Congress's actual purpose in enacting the discriminatory scheme at issue, much of which has come to light since *Flores-Villar* was decided. The Ninth Circuit is likely to have ruled the same as the Second Circuit did if the record before it had contained that same information at the time of its decision.

That information confirms that the 1952 Act's disparate treatment of unwed mothers' and unwed fathers' ability to confer derivative citizenship on their children born abroad was not motivated by the rationales the government asserts—*i.e.*, ensuring a connection between the child and the United States, and reducing the risk of statelessness. The discriminatory treatment instead reflects gender stereotypes regarding fathers' and mothers' respective parental roles in the lives of their non-marital children. Any such archaic and overbroad stereotypes

cannot provide a substantial justification for a gender-discriminatory statutory scheme.

As the court of appeals observed below (Pet. App. 22a), the Ninth Circuit's decision in *Flores-Villar* "provided no explanation for its conclusion" that the "'residence differential ... furthers the objective of developing a tie between the child, his or her father, and this country'" (quoting *Flores-Villar*, 536 F.3d at 997). As the decision below also noted (Pet. App. 34a n.17), the Ninth Circuit simply "assumed, *sub silentio*" that Congress enacted the differential physical presence requirements out of a concern for reducing the risk of statelessness for foreign-born children.

The Second Circuit decision below, by contrast, rests on a thorough review and analysis of legislative and executive records relating to the statutes at issue, as well as on intervening scholarship that exhaustively traces the history and origin of the statutes, rules, and agency practices governing the citizenship status of children born to U.S.-citizen parents outside of the United States. See Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race and Nation*, 123 Yale L.J. 2134 (2014) (cited at Pet. App. 28a n.9; Pet. App. 31a nn.13 & 14). Those records and research make clear that the discriminatory physical presence requirements were based not on the rationales the government asserts (Pet. 12-24), but rather on Congress's reflexive assumption that non-marital children are generally cared for by their mothers. Congress thus lowered the requirements for U.S.-citizen mothers to confer derivative citizenship on their non-marital foreign-born children in order to make it easier for those mothers to return to the United States

without separating from their children. See Pet. App. 31a & n.13 (citing Collins, 123 Yale L.J. at 2203, 2205).

Had the Ninth Circuit had before it all the historical, archival and scholarly materials presented to the Second Circuit in the extensive briefing and supplemental briefing below, it likely would have reached the same conclusion as the Second Circuit. Specifically, it likely would have concluded that the statutes' disparate treatment of unwed mothers and unwed fathers has nothing to do with ensuring adequate ties between foreign-born children and the United States or with reducing statelessness, and instead is based on impermissible gender stereotypes that cannot sustain the statutes.

Indeed, as a result of the Second Circuit's thorough analysis, other courts confronting the same issue have rejected the Ninth Circuit's holding in *Flores-Villar* in favor of the Second Circuit's decision below. In a recent case before the U.S. District Court for the Western District of Texas, for example, the district court considered the constitutionality of the same statutory scheme at issue here. See *Villegas-Sarabia v. Johnson*, 123 F Supp. 3d 870 (W.D. Tex. 2015), appeal filed, No. 15-60639(L), (5th Cir. Oct. 19, 2015) (briefing scheduled to be completed by July 27, 2016). After analyzing both *Flores-Villar* and the court of appeals' decision below, the district court rejected *Flores-Villar* and adopted the Second Circuit's holding that the discriminatory provisions violate the Fifth Amendment's equal protection guarantee. Thus, no circuit (and no district court outside of the Ninth Circuit) has approvingly cited *Flores-Villar* in the eight years since it was issued, but other lower courts began following the Second Circuit's decision below soon after its issuance.

This Court thus need not intervene in order to resolve the circuit split. The more prudent course is to allow the Ninth Circuit to reconsider its holding in *Flores-Villar* in light of the new evidence obtained from the relevant legislative, executive, and historical record set forth in the Second Circuit's decision, and to afford the Ninth Circuit "an opportunity to correct its error without the need for this Court to intervene." *Hittson v. Chatman*, 135 S. Ct. 2126, 2128 (2015) (Ginsburg, J., concurring in the denial of certiorari); see also Stephen M. Shapiro et al., SUPREME COURT PRACTICE ch. 6.37(i)(1), at 505 (10th ed. 2013) (denial warranted where it is "reasonable to expect that the courts that rendered [conflicting decisions] would reconsider their results in light of intervening developments").

B. There Is No Split Among The Lower Courts On The Second Question Presented

The second question presented likewise does not warrant review. There is no conflict among the lower courts as to the appropriate remedy for the equal protection violation here. In *Flores-Villar*, the Ninth Circuit upheld the statutory scheme as constitutional and therefore did not reach the remedy issue.[4] The

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[4] Had the Ninth Circuit found a constitutional violation, it likely would have agreed with the Second Circuit on the appropriate remedy. See *Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1418 (9th Cir. 1993) (upon finding an equal protection violation in a statute that allowed citizen fathers, but not citizen mothers, to transmit citizenship to foreign-born children, holding that the court could "utilize traditional constitutional remedies to rectify constitutional violations" and thus "redress [the statute's] impermissible gender-based discrimination by extending to

decision below is the *only* court of appeals decision to have addressed the appropriate remedy for the equal protection violation embodied in Sections 301 and 309. And the only district court to have considered the issue in light of the research and evidence now available reached the same conclusion as the court of appeals below. See *Villegas-Sarabia*, 123 F Supp. 3d at 894 ("[T]he Court finds that extension of the one-year continuous presence requirement to unmarried citizen fathers is the appropriate remedy for the equal protection violation here."). The absence of conflict among the lower courts weighs strongly against the Court's consideration of the second issue presented.

II. THE DECISION BELOW IS CORRECT

Review should be denied for the additional reason that the decision below is correct in both its finding of unconstitutionality and the remedy it ordered for that defect. To begin with, the court of appeals properly applied the intermediate scrutiny to which laws that discriminate on the basis of gender are subject. See *United States v. Virginia*, 518 U.S. 515, 524 (1996). The government misplaces reliance (Pet. 9-12) on *Fiallo v. Bell*, 430 U.S. 787, 794 (1977), for the proposition that the court of appeals should have applied a rational-basis standard of review. *Fiallo* involved Congress's plenary authority over immigration laws affecting *non*-citizens, and is thus inapplicable here for the reasons this Court explained in *Miller v. Albright*, 523 U.S. 420 (1998): "unlike the petitioners in *Fiallo*, [Morales-Santana] is not [an alien] challenging the denial of an application for special status. [He] is

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citizen mothers the same rights as those possessed by citizen fathers to transmit their citizenship to their children").

contesting the Government's refusal to register and treat [him] as a citizen." *Id.* at 432 (citation omitted).

The court of appeals likewise correctly applied intermediate scrutiny in holding that the government failed to show that the gender-discriminatory scheme here is substantially related to an actual and important governmental purpose. Based on its extensive analysis of the statutes' legislative history, the court of appeals properly concluded that the discriminatory scheme violates equal protection because it does not serve actual and important governmental interests but rather reflects and embodies stereotypes about the roles of mothers and fathers in the lives of non-marital children. The court of appeals also properly remedied the equal protection violation by extending to unwed fathers the same treatment the statute affords unwed mothers.

A. The Court of Appeals Correctly Held That The Statutory Scheme Violates The Equal Protection Guarantee Of The Fifth Amendment

The petition advances two rationales for the discriminatory scheme: (1) ensuring a connection between a foreign-born child and the United States and (2) preventing that child's possible statelessness. The court of appeals correctly held that the government failed to demonstrate that the discriminatory provisions embody or substantially advance either of those rationales. The legislative record, mismatch between the classification and asserted purposes, and availability of effective gender-neutral alternatives all support that conclusion and warrant denial of the petition.

1. The Discriminatory Scheme Is Not Substantially Related To Ensuring A U.S. Connection

While establishing a connection between a citizen parent's foreign-born child and the United States may well be an important governmental interest, the *discriminatory* physical presence requirements at issue here fail to substantially serve that interest, as the court of appeals correctly held (Pet. App. 21a-25a). The government does not offer (Pet. 12-16) any persuasive reason to suppose otherwise. Nor could it, for as the court of appeals correctly noted (Pet. App. 22a), there is no reason to suppose "that unwed fathers need more time than unwed mothers in the United States prior to their child's birth in order to assimilate the values that the statute seeks to ensure are passed on to citizen children born abroad." On the government's theory, unwed citizen mothers can transmit U.S. values to their foreign-born children after being present in the United States for just *one year* at any point in the mother's life (even during infancy), but unwed citizen fathers require *ten years* of presence in the United States to do the same (five of which must be after the father turns fourteen).

The government fails in its efforts to offer *post hoc* support for its supposed U.S.-connection rationale. The petition asserts (at 5, 13-14) that the statutory gender discrimination at issue reflects the "reality" that a mother is "typically" the only "legally recognized parent" to a non-marital child at the time of birth. But this Court's decisions foreclose the government's reliance upon a "typical," "general," or "majority" practice in other nations to justify gender discrimination. Empirical evidence often comports with gender stereotypes, but cannot justify their legal embodiment. See

J.E.B. v. Alabama ex rel. *T.B.*, 511 U.S. 127, 139 n.11 (1994) ("Even if a measure of truth can be found in some of the gender stereotypes used to justify [the practice at issue], that fact alone cannot support discrimination on the basis of gender."); *Craig v. Boren*, 429 U.S. 190, 201-04 (1976) (similar).

Moreover, the government cites but a single source to support its assertion (Pet. 21) that "the only parent legally recognized as the [non-marital] child's parent at the time of the birth usually was the mother," and that source does not remotely support the government's assertion. The source is Durward V Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248 (1935). The pages cited in the petition (Pet. 19 n.10, 21 (citing Sandifer, 29 Am. J. Int'l L. at 258-59 & n.38)) provide a survey of the citizenship laws in 79 countries. That survey revealed that only 29 of the countries studied had laws assigning the mother's nationality to non-marital children, while "about half" of the countries studied had no specific laws governing the citizenship of non-marital children. Sandifer, 29 Am. J. Int'l L. at 258. Contrary to the government's suggestion, the article says nothing at all regarding the separate issue of whether unwed mothers are the only "legally recognized" parents at birth in most countries.

In any event, even if the petition's version of "reality" were correct, it still would not explain why unwed citizen mothers require less physical presence in the United States than unwed citizen fathers in order to achieve Congress's purported interest in establishing a connection between the foreign-born child and the United States. Nor is there any evidence that Congress actually considered this purported

"reality" as its basis for enacting the discriminatory scheme.

2. The Discriminatory Scheme Did Not Have As Its Actual Purpose The Avoidance Of Statelessness

The petition asserts (Pet. 16-19) a second purported justification for the discriminatory scheme: the prevention of foreign-born children's potential statelessness. But as the court of appeals correctly held (Pet. App. 25a-32a), the government falls far short of meeting its burden to demonstrate that reducing the risk of statelessness was an actual purpose of the discriminatory requirements.

The court of appeals gave the government multiple opportunities—including in several rounds of post-argument supplemental briefing—to produce evidence supporting its statelessness rationale, but the government was unable to produce a single source confirming that the discriminatory scheme was intended to reduce the risk of statelessness. That is not surprising given that the statutes' physical presence requirements make it more difficult to confer U.S. citizenship on foreign-born children and thus are more likely to *increase* the incidence of statelessness than they are to reduce it.

The petition cites only two sources to support its argument that the discriminatory physical presence requirements were intended to reduce the risk of statelessness: a Senate Report issued in conjunction with the 1952 Act, S. Rep. No. 82-1137, at 38-39 (1952) ("Senate Report"), and the Sandifer article discussed above. But neither source remotely supports the government's statelessness rationale.

1. The Senate Report mentions statelessness, but as the court of appeals correctly observed (Pet. App. 28a-29a n.10), it did not do so to explain the disparate physical presence requirements. It did so only in explaining a feature of the 1952 Act that made it easier for a foreign-born child to acquire nationality at birth: namely, a provision eliminating the condition that a citizen mother could transmit nationality to a foreign-born child only if the father failed to legitimate the child prior to the child's eighteenth birthday. As the court of appeals correctly noted (Pet. App. 28a-29a n.10), the Senate Report thus provides no justification for the 1952 Act's gender-discriminatory physical presence requirements.

Moreover, the Senate Report was issued in connection with the 1952 Act, which largely maintained the same discriminatory physical presence requirements first enacted in the 1940 Act, with the exception that the 1952 Act made it *more* difficult for unwed mothers to confer derivative citizenship. While the 1940 Act required only any period of physical residence, the 1952 Act imposed a one-year continuous physical presence requirement. Seeking to reduce the risk of statelessness by making it more difficult for unwed mothers to confer derivative citizenship would be an illogical and counterproductive approach. The Senate Report thus cannot justify the discriminatory physical presence requirements at issue here.

2. The only other source the petition relies on to support its statelessness rationale is the Sandifer article cited in the congressional hearings for the 1940 Act. The petition cites Sandifer in support of its assertion that unwed mothers of foreign-born children faced a greater risk than unwed fathers of having stateless children because "the laws of many other

countries would not extend citizenship to such a child born in that country" (Pet. 20) and "when a child was born out of wedlock, the only parent on whom a child's citizenship *at the time of birth* could be based in a *jus sanguinis* country was the mother," (Pet. 21) (emphasis in original). The government's reliance on Sandifer is misplaced for several reasons.

First, Sandifer cautioned that his study "does not ... purport to furnish a complete picture of the laws of any given country with respect to the subject included." Sandifer, 29 Am. J. Int'l L. at 249. In addition, Sandifer did not study the laws of *every* country, and it is not clear how he determined which countries to study. Thus, the Sandifer article cannot establish a purported "legal reality" in all nations outside of the United States.

Second, as discussed above, Sandifer observed that in "about half the states studied" there was *no* legislation governing the nationality of non-marital children. *Id.* at 258. Of the countries Sandifer studied, only 30—a minority—had laws that specifically provided for the nationality of non-marital children. *Id.* In 29 of those countries, non-marital children followed the mother's nationality, *but only* in the absence of acknowledgment or legitimation by the father—which could occur at or very soon after birth—in which case the child would be assigned the father's nationality. *Id.* at 258-59. And in at least one country studied by Sandifer, the law provided that a non-marital child would take the father's nationality regardless of acknowledgment or legitimation. *Id.*

Third, the risk of statelessness arises only when a child is born in a nation that exclusively follows the *jus sanguinis* rule of citizenship (*i.e.*, the rule that provides that a child takes the nationality of his or her

mother or father). In the many countries that follow the *jus soli* rule (*i.e.*, the rule that a child obtains the nationality of the country in which the child is born), there is no risk of statelessness. Sandifer observed that over 30 of the countries he studied followed some form of the *jus soli* rule that would eliminate the risk of statelessness for non-marital children. *Id.* at 249-50. Thus, Sandifer's article fails to support the government's argument (Pet. 19-21 & n.10) that there existed a worldwide "legal reality" that created a greater risk of statelessness for children of unwed mothers than it did for children of unwed fathers,

Fourth, although the Sandifer article was cited in the congressional report on the 1940 Act Hearings (see Pet. 19-20 n.10), the 1940 Act Hearings did not mention statelessness at all. Citation of the Sandifer article in that context thus cannot support any inference that statelessness concerns motivated the 1940 Act's discriminatory physical presence requirements.

In sum, neither the Senate Report nor the Sandifer article supports the petition's proffered statelessness rationale for the discriminatory physical presence requirements at issue.

3. Congress's Actual Purpose In Enacting The Discriminatory Scheme Rests On Archaic And Overbroad Gender Stereotypes

It is well settled that the justification for any gender classification "must be genuine, not hypothesized or invented post hoc in response to litigation." *Virginia*, 518 U.S. at 533; see Pet App. 16a. As discussed, the government's *post hoc* U.S.-connection and statelessness rationales fail to satisfy that requirement. To the

contrary, the legislative and administrative history of the 1940 Act make clear that Congress enacted the discriminatory physical presence requirements based on the actual purpose to reflect the gender-based stereotype that mothers, not fathers, are the primary caretakers of non-marital children. Congress therefore sought to make it easier for unwed U.S.-citizen mothers to return to the United States together with their children born abroad.

As one State Department representative put it, "it is well known that almost invariably it is the mother who concerns herself with the [non-marital] child. For this reason [the provision enacted as 1940 Act Section 205] as drawn up by the Committee slightly discriminates in favor of women . " Letter from J. Scanlan to R. Shipley, Chief, Passport Div., U.S. Dep't of State (Mar. 7, 1936) at 6. The statement of another State Department representative similarly demonstrates that, before the 1940 Act, the Department's policy of recognizing as U.S. citizens the foreign-born children of unwed U.S.-citizen mothers was based on the generally held view that "the mother 'has a right to the custody and control of [a non-marital] child as against the putative father, and is bound to control it as its natural guardian.'" 1940 Act Hearings, 76th Cong. 431 (citation omitted).

Recent scholarship confirms that the 1940 Act relied heavily on prevailing norms and stereotypes concerning the relative roles and responsibilities of mothers and fathers in parenting non-marital children. As the article cited prominently in the decision below states, "[m]emo after memo ... reveals U.S. officials' nearly uniform view that it was only practical to keep mothers and their non-marital children together, as mothers were the presumed caretakers of

such children." Collins, 123 Yale L.J. at 2202-03 (cited at Pet. App. 31a n.13).

The government ignores that scholarship in the petition, as it does the abundant legislative and administrative history upon which the court of appeals relied in reaching this conclusion. Moreover, in asserting (Pet. 20) that the court of appeals was merely "speculating" that the discriminatory physical presence requirements at issue "reflect gender-based generalizations," the government ignores that its own account of Congress's purported purposes in enacting the discriminatory scheme relies only upon unsupported inferences from a mere two documents.

In sum, the court of appeals' holding that the discriminatory physical presence requirements at issue were impermissibly based on gender-based stereotypes regarding the roles of mothers and fathers in the lives of non-marital children is amply supported by the court of appeals' extensive analysis of the historical record of the statutes at issue. That analysis also confirms that there is no evidence indicating that Congress actually had either of the government's proffered rationales in mind when it enacted the discriminatory scheme. Based on this analysis and the court of appeals' proper application of this Court's equal protection jurisprudence, the court of appeals correctly held that the discriminatory scheme violates the Fifth Amendment's guarantee of equal protection.

B. The Court Of Appeals Properly Remedied The Statutes' Constitutional Defect

In order to remedy the equal protection violation, the court of appeals relied on this Court's well-established precedent favoring extension of the rights

at issue to the class of persons to which the rights previously were unconstitutionally denied. Thus, the court of appeals correctly held (Pet. App. 35a-41a) that both unwed mothers *and* unwed fathers may satisfy the statutes' physical presence requirements by residing in the United States for a continuous period of one-year at any point prior to the child's birth.

The government argues (Pet. 29) that extending the more lenient physical presence requirements to unwed fathers is contrary to legislative intent because "there is no basis for assuming that Congress necessarily would have preferred to let the exception swallow the rule." According to the government, the proper remedy is to impose on unwed mothers the more onerous physical presence requirements applicable to unwed fathers, thereby restricting, rather than extending, the benefit at issue. The government is incorrect.

First, the court of appeals' decision properly follows precedent requiring the government to remedy equal protection violations by leveling up rather than leveling down. See, *e.g.*, *Califano v. Westcott*, 443 U.S. 76, 89-93 (1979) (affirming extension of benefits to children of unemployed women rather than terminating benefits to those Congress intended to benefit, *i.e.*, all children of the unemployed); *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (proper remedy for denial of social security survivorship benefits was retroactive extension to men on terms previously reserved for women); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (similar as to widowers). As the court of appeals observed (Pet. App. 39a), the government was unable to identify "a single case in which the Supreme Court has contracted,

rather than extended, benefits when curing an equal protection violation through severance."

Second, imposing more onerous restrictions on unwed mothers' ability to confer derivative citizenship would only frustrate the interests that the government claims the statutory scheme was intended to advance. With respect to the government's asserted interest in ensuring a connection between the foreign-born child and the United States, for example, the relief ordered below is limited to children who have been acknowledged or legitimated by their U.S.-citizen fathers, and, by virtue of this relationship, are likely to have a strong connection to the United States.

The government's proposed remedy makes even less sense when considered in light of the government's asserted interest in reducing the risk of statelessness. Imposing on unwed mothers the more onerous physical presence requirements that the statutes impose on unwed fathers would only make it more difficult for unwed mothers to confer derivative citizenship on their foreign-born children, thereby *increasing* the risk of statelessness.

Third, contrary to the government's argument (Pet. 26-27), the court of appeals' remedy does not result in the court "granting" or "'conferr[ing]'" citizenship upon an individual who previously was not a citizen. Instead, the remedy below merely cures the constitutional defect by recognizing pre-existing citizenship. As the court of appeals correctly observed (Pet. App. 7a), "[u]nlike citizenship by naturalization, derivative citizenship exists as of a child's birth or not at all" (citing 8 U.S.C. § 1409(a), (c); *cf. id.* § 1101(a)(23)).

Fourth, the government missteps in asserting (Pet. 26) that the court of appeals' remedy would "have the

effect of granting U.S. citizenship (from birth) to an untold number of individuals" who "grew up with no expectation that they were citizens of the United States." The petition offers no evidence that the number of affected persons is significant; to the contrary, it concedes the number is "untold." Nor does the petition explain how recognizing such a group of U.S. citizens will affect any governmental interests.

Finally, the government's proposed remedy—subjecting unwed mothers to the age-calibrated, ten-year physical presence requirements that the statutes impose on unwed fathers—would potentially replace one constitutional violation with another by stripping derivative U.S. citizenship from foreign-born persons whose unwed citizen mothers did not satisfy those more onerous requirements. "In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship." *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967). Thus, it is not possible to retroactively strip citizenship from foreign-born U.S. citizens who obtained derivative citizenship at birth from unwed citizen mothers who satisfied the one-year physical presence requirement in the relevant time period.

The petition offers no basis for applying its proposed remedy only prospectively—nor could it, because the statutory scheme concerns citizenship *at birth* and remains in the current version of the INA (albeit in amended form). Moreover, a prospective remedy would conflict with this Court's precedent regarding the retroactive effect of remedies for constitutional violations. See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding that a ruling regarding unconstitutional racial discrimination under Fourteenth Amendment must "be applied retroactively to all

cases, state or federal, pending on direct review or not yet final, with no exception").[5]

C. Summary Affirmance Is Warranted

As discussed, the court of appeals correctly held that the discriminatory physical presence requirements violate the Fifth Amendment's equal protection guarantee, and that the proper remedy is to extend to unwed fathers the more lenient requirements applicable to unwed mothers. The petition therefore should be denied.

In the alternative, because the court of appeals' decision is clearly correct, if the Court is inclined to grant the petition, it should summarily dispose of the case by affirming the decision below See, *e.g.*, Shapiro, SUPREME COURT PRACTICE ch. 5.12(a), at 344 (noting the Court's practice of summary affirmance "where the judgment below is thought to be so obviously correct and the conflicting decision so clearly wrong that the Court feels further consideration is unnecessary") (citing *United States v. Lane Motor Co.*, 344 U.S. 630, 631 (1953) (per curiam) (granting petition and summarily affirming to resolve circuit conflict on issue of statutory interpretation of Internal Revenue Code where "[w]e think it clear" the lower court's decision is correct)); see also *Lines v. Frederick*,

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[5] See also, *e.g.*, *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) (recognizing "a general rule of retrospective effect for the constitutional decisions of this Court. Nothing in the Constitution alters the fundamental rule of retrospective operation that has governed judicial decisions for near a thousand years.") (citations and quotation marks omitted); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991) (giving judicial decisions full retroactive effect is "overwhelmingly the norm").

400 U.S. 18, 20-21 (1970) (granting petition and summarily affirming to resolve circuit conflict on issue of statutory interpretation of Bankruptcy Act).

III. THIS CASE PRESENTS A POOR VEHICLE FOR RESOLVING THE CONSTITUTIONAL QUESTIONS PRESENTED

Even if the Court were to determine that the questions presented by the petition are otherwise worthy of review, the petition still should be denied because multiple alternative statutory grounds support the judgment. This case is therefore a poor vehicle for attempting to resolve the constitutional issues.

This Court has long recognized that, where an appeal presents both statutory and constitutional grounds for affirmance, the Court should avoid reaching the constitutional issue if possible by deciding the case on statutory grounds. See *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam) (declining to resolve Fourteenth Amendment issue where "[a]ffirmance on the statutory ground would moot the constitutional issues presented by the case"); *Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963) (resolving immigration case on "threshold issue of statutory construction," which "obviat[ed]" the government's constitutional questions); see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (Brandeis, J., concurring) ("[c]onsiderations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so").[6]

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[6] It is irrelevant that the court of appeals rejected these statutory grounds. See Pet. App. 10a-13a. Respondent is "free to

The availability of alternative statutory grounds for affirmance also weighs against granting a petition for certiorari. See *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 929 (2016) (Thomas, J., concurring in the denial of certiorari) (petition "raises threshold questions ... that *might* preclude us from reaching the [constitutional] question") (emphasis added); Shapiro, SUPREME COURT PRACTICE ch. 4.4(e), at 248 (where case can be decided on alternative ground, a "conflict itself may not be sufficient reason for granting review"). Here, two statutory bases for Respondent's derivative citizenship exist.

1. To receive derivative citizenship, Section 301(a)(7) of the 1952 Act required that, prior to Respondent's birth, his father had resided in the United States or a U.S. outlying possession for ten years, five of which were after he turned fourteen years old. During the relevant period, Puerto Rico was a U.S. outlying possession. Because Respondent's father was physically present in Puerto Rico for nearly all of his first 19 years, departing for the Dominican Republic only 20 days shy of his nineteenth birthday, this Court may find that Respondent's father substantially satisfied the requirements of Section 301(a)(7) on the ground that the 20 days his father spent outside of the United States is *de minimis* and not a basis for denying Respondent citizenship.

Numerous other physical presence requirements under immigration law incorporate "grace periods" to prevent the forfeiture of important rights due

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defend [his] judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the Court of Appeals." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

to *de minimis* absences. See, *e.g.*, 8 U.S.C. §§ 1229b(b)(1)(A), (d)(2) (continuous absences of 90 days, or fewer than 180 days in the aggregate, do not break "continuity" for physical presence); 1255a(a)(3)(B) ("brief, casual, and innocent absences from the United States" do not interrupt "continuous physical presence").

Such an approach is especially appropriate in this case, for absent such a reasonable grace period, it was *impossible* for Respondent's father to have passed derivative citizenship to his child merely because he had not yet reached the age of nineteen. Cf. *Fleuti*, 374 U.S. at 456 (interpreting immigration residency requirement, Court will "not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious" and "too irrational to square with the statutory scheme") (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)).[7]

2. In any event, the Dominican Republic was an "outlying possession" of the United States in 1919 when Respondent's father arrived from Puerto Rico,

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[7] The court of appeals rejected this argument (Pet. App. 10a) because: (1) the statute does not explicitly excuse *de minimis* absences; and (2) Respondent's father's 20-day absence was not a "gap," because he did not subsequently return to Puerto Rico. Neither justification holds. *First*, this Court has recognized implicit *de minimis* exceptions to immigration statutes where alternative constructions are excessively harsh. See, *e.g.*, *Fleuti*, 374 U.S. at 458 (return from day trip to Mexico not deemed "entry" under immigration law based on "policies underlying" statute). *Second*, whether the absence occurred in the middle or at the end of Respondent's father's physical presence in Puerto Rico has no bearing on whether the outcome is equitable. Moreover, Respondent's father *did* return to the United States, and lived here with Respondent and his mother until his death.

and thus the 20 days he spent there before his nineteenth birthday should not deprive him of the ability to confer derivative citizenship on Respondent.

Under the 1952 Act, the term "outlying possessions" included American Samoa, Swains Island, and "any other territory which was, in fact and law, an outlying possession of the United States during the period of the citizen parent's physical presence therein." *Matter of V-*, 9 I. & N. Dec. 558, 561 (BIA 1962). The United States' occupation of the Dominican Republic and its plenary control of its government from 1916 to 1924 demonstrate that the Dominican Republic should have been considered an outlying possession of the United States in 1919.

The United States formally occupied the Dominican Republic on November 29, 1916. See Bruce J. Calder, THE IMPACT OF INTERVENTION: THE DOMINICAN REPUBLIC DURING THE U.S. OCCUPATION OF 1916-1924, xxvii, 17 (2d ed. 2006). The commander of the U.S. Atlantic Fleet cruiser force (who was the soon-to-be Military Governor of the Dominican Republic) issued a Proclamation of the Military Occupation of Santo Domingo by the United States decreeing that the "Republic of Santo Domingo" was hereby "placed in a state of military occupation" and "made subject to military government and to the exercise of military law applicable to such occupation." *Proclamation of the Military Occupation of Santo Domingo by the United States*, 11 Supp. Am. J. Int'l L. 94, 95 (1917). In mid-December 1916, U.S. officials declared the Republic's recently adopted constitution illegal. See Calder, 18-19. On December 26, they suspended elections. *Id.* And on January 2, 1917, they suspended indefinitely the Dominican Congress. *Id.* In the words of the military government in 1920: "The United

States has conducted the customs administration of the Dominican Republic for the past fifteen years and the administration of the *entire government* for the past three years." *Santo Domingo: Its Past and Its Present Condition*, Pamphlet prepared by the Military Government of Santo Domingo 14 (Jan. 1, 1920) (emphasis added).

Thus, even if Respondent's father's 20-day period in the Dominican Republic were not treated as *de minimis* under Section 301(a)(7) (as it should be), Respondent's father still should be considered to have satisfied the statutory physical presence requirements because the 20-day gap was spent in the then-U.S. outlying possession of the Dominican Republic.[8]

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[8] The court of appeals held otherwise (Pet. App. 12a-13a) because: (1) there was no "treaty or lease" pursuant to which the Dominican Republic was acquired; and (2) the United States' military occupation of the Dominican Republic did not extinguish the latter's sovereignty. Such reasoning places form over substance. During the U.S. occupation of the Dominican Republic from 1916 to 1924, residents were ruled by a U.S. government that established U.S.-style institutions, reforms, taxes, and laws. Indeed, for a portion of that time, including 1919, U.S. citizens could enter the Republic without a passport. And assuming that the purpose of the 1952 Act's physical presence requirements was to promote in foreign-born children a connection to U.S. character and values, see *Matter of Y-*, 7 I. & N. Dec. 667, 669 (BIA 1958), the United States' plenary control over the Dominican government furthered that goal.

CONCLUSION

The petition for a writ of certiorari should be denied, but if it is granted, the Court should summarily affirm.

Respectfully submitted,

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APPENDIX

APPENDIX

As noted in the Solicitor General's letter to the Court dated May 17, 2016, the appendix to the government's petition for a writ of certiorari contains an error. The petition appendix reproduces the opinion of the Second Circuit, as that opinion was printed in the Federal Reporter, at 804 F.3d 520. Pet. App. 3a-41a. The reported version of the opinion, however, erroneously omits nine words from the second full paragraph on page 529 of volume 804, which appears at page 20 of Court of Appeals' Certified Amended Opinion (Dkt. 206). The same words are likewise erroneously omitted from the full paragraph on page 20a of the petition appendix. That paragraph should read as follows, including the nine words in boldface print:

> For these reasons, we conclude that the gender-based scheme in §§ 1401 and 1409 can be upheld only if the Government shows that it is substantially related to an actual and important governmental objective. *See Virginia*, 518 U.S. at 531, 533, 535-36; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). In assessing the validity of the gender-based classification, moreover, **we consider the existence of gender-neutral alternatives to the** classification. *See, e.g.*, *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980); *Orr v. Orr*, 440 U.S. 268, 281 (1979); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975).